Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

No. 76-1761

DAVID JOHNSTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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To the United States Court of Appeals for the Seventh Circuit

David Johnston, Petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on November 8, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals of the Seventh Circuit is not published but is set forth in full as Appendix "A" to this petition. The opinion of the Court of Appeals affirmed the conviction of David Johnston for an alleged violation of the Hobbs Act, 18 USC, Section 1951. The petitioner had been tried before a jury in the United States District Court for the Eastern District of Illinois, the Honorable James L. Foreman, Judge presiding, and was found guilty on April

16, 1975. The Court denied defendant's post-trial motion, imposed a sentence upon the defendant and entered judgment of conviction against the defendant.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on November 8, 1976. A Petition for Rehearing was timely filed and denied by the United States Court of Appeals. Jurisdiction of this Court is invoked under 28 USC, Section 1254(1).

QUESTION PRESENTED

Whether Rule 6(d) of the Federal Rules of Criminal Procedure permits an FBI Agent to be present before the Grand Jury while the Government's informant is testifying if said FBI Agent is not present as an interpreter or as a stenographer or operator of a recording device for the purpose of taking evidence.

Whether the presence of an unauthorized person is *prima facie* prejudicial thereby placing the burden on the Government to prove no actual prejudice resulted to the defendant by the presence of said unauthorized person.

STATUTE INVOLVED

Rule 6(d) of the Federal Rules of Criminal Procedure states:

> "Who may be present. Attorney for the Government, the witness under examination, interpreters when needed, and for the purpose of taking the evidence, a stenographer

or operator of a recording device may be present while the Grand Jury is in session, but no person other than the jurors may be present while the Grand Jury is deliberating or voting."

STATEMENT OF THE CASE

This action arose by the return of an indictment on November 26, 1974, by the Grand Jury for the United States District Court for the Eastern District of Illinois, which charged David Johnston with a violation of the Hobbs Act, 18 USC, Section 1951. The case was tried before a jury in the Court of the Honorable James L. Foreman, and the defendant was found guilty. The trial court denied all of defendant's post-trial motions and imposed a term of imprisonment on petitioner, David Johnston.

During one of the sessions of the Grand Jury in which evidence against the Petitioner was being heard, an FBI Agent was present while the Government's informant (Marvin Schwartz) was testifying. The Government states that the FBI Agent was present to assist the Assistant United States Attorney in presenting to the Grand Jury certain tape recordings of conversations between the informant (Schwartz) and, among others, Johnston. It is readily apparent that the FBI Agent was not present for any purpose permissible under Rule 6(d). A copy of the relevant portions of the Grand Jury record is attached hereto as Appendix "B".

CONCLUSION

Certiorari is warranted here. This Court itself adopted Rule 6(d) of the Federal Rules of Criminal Procedure. This Court has never decided the issue presented in this case.

The errors of the Court below should not be permitted to stand.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

(Argued April 16, 1976)

November 8, 1976

Unpublished Order
Not to Be Cited
Per Circuit Rule 35

Before

Hon. Thomas E. Fairchild, Chief Judge

Hon. Wilbur F. Pell, Jr., Circuit Judge

Hon. James E. Noland, District Judge*

United States of America, Plaintiff-Appellee, Nos. 75-1616, 75-1673 and 75-1674 vs. Del Rutherford, David Johnston, and John William Cook, Defendants-Appellants.	Appeals from the United States District Court for the Eastern District of Illinois, East St. Louis Division. No. 74-CR-116 E.

James L. Foreman, *Judge*.

ORDER

Appellants Del Rutherford, David Johnston and John William Cook ask us in these appeals to review their guilty ver-

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* District Judges James E. Noland of the Southern District of Indiana is sitting by designation.

dicts for aiding and abetting in a "kickback" scheme in violation of the Hobbs Act, 18 U.S.C. § 1951 (Count I). In addition, Rutherford was convicted of obtaining property by the "wrongful use of economic fear" in violation of the same Act (Count II), and Cook was found guilty of making a false statement to the grand jury in violation of 18 U.S.C. § 1623 (Count III). Cook was tried separately.

I

The appellants were indicted and convicted for their participation in a scheme to obtain a kickback for George Thomas, President of the Village Board of Trustees of Brooklyn, Illinois, from various contractors providing services on the "Brooklyn Pump Job." The Board of Trustees had authorized the construction of the pump project to upgrade the sewer system in Brooklyn. Count I of the indictment charged that Rutherford, a bond salesman, Johnston, the owner of an engineering firm, and Cook, the project engineer working for Johnston, had induced Thomas to receive $4,000 so that he would "suspend his independent and unbiased judgment" in considering and selecting contractors to construct the pump project. Rutherford was charged in Count II of the indictment with obtaining property from contractors by threatening that he would not secure the necessary financing unless the contractors paid him. Count III charged Cook with making a material false statement to the grand jury, denying that he knew the reason for the payment of $1,700 to Thomas.

II

John William Cook

Cook argues in regard to Count I that the government failed to lay a proper foundation for introducing into evidence a tape

recording and its duplicate of a conversation held on December 7, 1973 between himself and Marvin Schwartz, a contractor involved in the kickback scheme. Schwartz had subsequently worked for the government and testified at the trial. This evidence included statements which tended to incriminate the appellant. Cook contends that since neither Schwartz nor any FBI agent involved in the case listened to the original recording of the conversation, the authenticity of the original and the copy is in doubt. The district court denied the defendant's motion to suppress the tapes and allowed the duplicate to be played to the jury.

We are satisfied, however, that the court did not abuse its discretion in admitting the evidence. See *United States v. Bridges*, 499 F.2d 179, 185 (7th Cir. 1974), *cert. denied*, 419 U.S. 1010 (1975). While neither Mr. Schwartz nor any government agent listened to the original tape, Mr. Schwartz testified that a transcript made from a copy of the original indicated that the original accurately reflected the conversation. The defendant does not challenge the chain of custody of either the original or duplicate. *Cf. United States v. Santiago*, No. 75-1971, slip op. at 6 (7th Cir. April 22, 1976). Nor does Cook argue that the duplicate, which was played to the jury, violated the best evidence rule. See *United States v. Knohl*, 379 F.2d 427, 441 (2d Cir. 1967), *cert. denied*, 389 U.S. 973 (1968). The foundation for admitting the original tape into evidence was properly established first by detailing the chain of custody of the tape from Schwartz to agents Ahler and Grooms. Next, the government established, through the testimony of Agent Ahler, that the duplicate was an exact reproduction of the original. It further demonstrated that Schwartz was given a transcript of the duplicate, which he found to be an accurate account of the conversation between himself and Cook. Schwartz' testimony sufficiently established the authenticity of the duplicate, and Ahler attested to the replication of the duplicate, and accounted for the custody of the original from the time it left Schwartz' possession

until it was offered into evidence. *United States v. McMillan*, 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975). Finally, nothing in the record suggests, nor does Cook argue now, that Schwartz or any government agent tampered with the original or the duplicate.

In attacking his conviction on Count III, Cook contends that the evidence was insufficient to prove beyond a reasonable doubt that he made a "false material declaration" to a grand jury in violation of 18 U.S.C. § 1623. Count III charged that Cook made a material false declaration to the grand jury when he testified that he did not know the reason for the payment of $1,700 to George Thomas. Cook argues that even though he had been asked to determine whether $1,700 could be allocated from the pump project budget for George Thomas, he did not know why Thomas was to receive it. He also asserts while his answers may have been unresponsive or misleading, they were literally true, and, therefore, not indictable under the perjury statutes.

We are not persuaded, however, by these arguments. Pressed by government counsel and a grand juror, Cook continued to deny that he knew the purpose of the $1,700 although defendant Johnston had asked him if the estimated budget of the pump project contained sufficient slack to make such a payment to George Thomas. Cook's alleged false answer was responsive and found to be false by the jury. The appellant's grand jury testimony cannot be subjected to more than one interpretation. Therefore, it does not fit into the category of answers which are literally true but unresponsive to the questions asked, and consequently can be the subject of a perjury indictment. *Bronston v. United States*, 409 U.S. 352, 361-62 (1973). See also *United States v. Williams*, No. 75-2144, slip op. at 3 (7th Cir., July 1, 1976). In addition, we find that the evidence was sufficient to support the jury's verdict. From the circumstances, including Cook's explanation of what he thought when he was

asked to find $1,700 in the budget for Thomas, and Agent Dyer's testimony concerning that Cook had told him about the money, the jury could find that Cook knew that the money was intended as a pay-off to Thomas.

III

Del Rutherford

At the outset, Rutherford argues that Count I of the indictment is defective because it fails to allege a necessary element of the Hobbs Act, *i.e.*, extortion, and that it does not state with sufficient specificity the name or names of the victims of the crime.

The attack upon Count I requires no prolonged discussion. Count I, after alleging Thomas' official capacity, charges that defendant Rutherford ". . . did aid, abet, procure, and induce George Raymond Thomas to affect commerce by obtaining property from contractors doing business with the Village of Brooklyn, with the contractors consent induced under color of official right." Although the indictment does not specifically employ the word extortion, the phrasing encompasses language almost identical to one branch of the definition of extortion contained in the Act, 18 U.S.C. § 1951(b)(2). In addition, the crux of the offense, "the use of office to obtain payments," is clearly stated in the indictment. *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Finally, the indictment specifically apprises the defendant of the time during which he is alleged to have acted, and the nature of the conduct which is charged as criminal. Therefore, Count I complies with the standards set forth in *Hagner v. United States*, 285 U.S. 427, 431 (1932), and protects the defendant against any future double jeopardy. See *United States v. Kenny*, 462 F.2d 1205, 1214 (3rd Cir. 1972).

Rutherford further argues that the evidence presented at trial was insufficient to support the verdict under Count II. This count charged Rutherford with "obtaining property from contractors doing business with the Village of Brooklyn . . . with the contractors consent induced by wrongful use of economic fear . . ." Specifically, Rutherford is alleged to have threatened to withhold money obtained through the sale of bonds unless he was paid a kickback by the contractors. The appellant contends that the government failed to prove that he made such threats, or that at the time of making these alleged threats he had the power to stop payment of the funds.

While we recognize that the use of "economic fear" may properly constitute an offense under the Hobbs Act, *United States v. Quinn*, 514 F.2d 1250, 1256 (5th Cir. 1975), the evidence in this case is insufficient to support the jury verdict. Rutherford testified, and the government did not challenge this part of his testimony, that he had no control over the proceeds of the bond sale once they were deposited with the treasurer of Brooklyn. The alleged use of economic fear on the contractors concededly occurred after the turnover of the funds. In addition, both Calhoun and Schwartz, the government's primary witnesses against Rutherford, testified on cross-examination that Rutherford had not threatened to withhold the bond proceeds if he did not receive a kickback. In fact, Schwartz admitted that he knew that the bond proceeds were already deposited by the time the kickbacks were paid, and that Rutherford no longer had control over the funds. Calhoun did testify on direct examination that he attended a meeting at which Rutherford was present, and that a kickback for Rutherford was discussed. He testified that Rutherford "implied" a threat to stop the project if he were not paid. The government offered no other substantial evidence to demonstrate Rutherford's use of "economic fear" to obtain a kickback. The lack of evidence concerning a specific threat to withdraw the bond money, coupled with Rutherford's inability to recall these funds, indicates that the verdict was not supported

by substantial evidence. *Glasser v. United States*, 315 U.S. 60, 80 (1942). The evidence presented by the government clearly establishes Rutherford's participation in "aiding and abetting" Thomas to obtain kickbacks as charged in Count I, but does not show that Rutherford also used the fear of economic loss against the contractors, since the contractors were not in the picture until after the financing was beyond Rutherford's control.

Anticipating reversal of his conviction under Count II, Rutherford argues that testimony relevant only to his conviction under Count II was admitted into evidence and thereby "tainted" his conviction under Count I. He suggests that under the authority of *Benton v. Maryland*, 395 U.S. 784, 798 (1969), we should reverse and remand for a new trial on Count I.

We have already held that Count I properly stated the elements of the offense. *Benton, supra,* requires a remand if a conviction on a proper count is tainted by evidence that was admissible only for the conviction on the count which was reversed or found improper. In *Benton* the Supreme Court was not sure whether evidence admitted to prove larceny, a crime for which the defendant should not have been retried, would also be admissible to prove burglary; therefore, the Court remanded the question to the state court. We, however, are not faced with the same problem. Both Counts I and II charged related violations of the Hobbs Act. The evidence relevant to Count II would have been admissible under Count I as well. The testimony concerning payments made by Marvin Schwartz to Rutherford, the evidence which Rutherford claims tainted his trial, certainly was relevant to the charge stated in Count I. Fed. Rules Evid. Rule 401, 28 U.S.C. Rutherford has not referred us to any other evidence, nor did we find any in the record, that would have been admissible only with regard to Count II. A remand for a new trial on Count I is therefore unnecessary.

Rutherford further argues that the district court erred in admitting into evidence, over his objection, the testimony of Agent

Dyer concerning statements made by defendant Johnston to him. Dyer testified that Johnston did recall a conversation that he had with appellant Cook concerning the payment of $1,700 to George Thomas. Rutherford contends that this testimony should not have been admitted because it was hearsay. He asserts that this testimony was prejudicial to his defense since it tended to corroborate other testimony given by Cook which was being used against him. Rutherford claims that this testimony denied him the constitutional right to confront witnesses who testified against him.

We are satisfied, however, that the testimony was admissible. It was offered as an admission by a defendant and, therefore, is not hearsay with regard to that defendant. Fed. Rules Evid. Rule 801(d)(2)(A), 28 U.S.C. In addition, since the statement had arguably no direct bearing on the specific charges against Rutherford, he would not ordinarily be entitled to cross-examine the out-of-court declarants concerning this statement. *United States v. Blassick*, 422 F.2d 652, 655 (7th Cir. 1970), *cert. denied*, 402 U.S. 985 (1971). However, in this case both Johnston and Cook were subjected to cross-examination concerning the substance of Agent Dyer's testimony. Therefore, even if the statement was inculpatory, Rutherford was afforded the required constitutional safeguards regarding admissions of a co-defendant. *Nelson v. O'Neil*, 402 U.S. 622, 626-630 (1971).

Finally, Rutherford, joined by appellant Johnston, asserts that the jury verdict was successfully impeached by the testimony of juror Gruber. Gruber testified in a post-trial hearing that another juror stated during the deliberations that she knew Johnston and implied that he was dishonest. Gruber also testified that still another juror told the jury that, based on her personal knowledge of the bond sales business, Rutherford could have recaptured the money deposited in the bank of Brooklyn.

We share the appellants' concern that a juror who has personal knowledge of a defendant must not be allowed to influence the jury with the details of that information. We also

recognize that jurors may testify, when their verdict is impeached, concerning the "question of the existence of any extraneous influence" introduced into the deliberations. *Mattox v. United States*, 146 U.S. 140, 149 (1892). However, the validity of the verdict is not set aside without a clear showing of the prejudicial impact of "outside influence." See *Parker v. Gladden*, 385 U.S. 363, 364-66 (1967). In this case each juror was carefully examined concerning personal knowledge of the defendants and with regard to any statement heard about fellow jurors' acquaintance with the defendants. All the jurors, with the exception of Gruber, testified that they neither knew the defendants nor heard any other juror claim any personal knowledge of any of the defendants. We are satisfied, therefore, that no outside influence improperly entered into the deliberations. Furthermore, because we have reversed Rutherford's conviction under Count II, we are not concerned with the alleged statements made by a juror with regard to the control of the proceeds of the sale of bonds.

IV

David Johnston

Appellant Johnston claims that he was promised immunity from prosecution by the government in return for his cooperation, and that after he attempted to help the government's investigation he was indicted in breach of this promise. He argues that this promise is binding on the government and that his indictments should be dismissed.

Granting immunity to witnesses requires approval by the court. 18 U.S.C. § 2514. However, if a promise to obtain immunity is made, and the witness "relied upon it in incriminating himself and others, the government should be held to abide by its terms." *United States v. Carter*, 454 F.2d 426, 427 (4th Cir. 1972) (en banc). The evidence does not indicate that such a promise was made to Johnston by the government. The government offered to consider a grant of immunity if Johnston

would cooperate. He did not furnish the information that the government thought he could, and the offer was withdrawn. Before trial the government agreed not to use any statements or records offered by Johnston in its case in chief. Therefore, any misunderstanding Johnston may have had regarding the immunity did not materially jeopardize his defense at trial. The district court did not abuse its discretion by holding that no promise of immunity had been made to Johnston.

V

Appellants Johnston and Rutherford have moved this court, subsequent to oral argument, to dismiss the indictment or order the district court to hold an evidentiary hearing because a government agent was present in the grand jury room. Rule 6(d) of the Federal Rules of Criminal Procedure, 18 U.S.C., provides that "interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session." The agent was present in the grand jury room during the testimony of Marvin Schwartz. The agent, who was introduced to the grand jury, was present to assist in playing a tape which Marvin Schwartz had recorded earlier. We find under these circumstances the presence of the agent, although not expressly authorized by Rule 6(d), was reasonably necessary and within the spirit of the rule. In addition, Johnston has made no specific allegations that the agent violated the secrecy of the grand jury or intimidated the jurors. See *United States v. Isaacs*, 347 F.Supp. 743, 749 (N.D. Ill. 1972); *United States v. Kazonis*, 391 F.Supp. 804, 805 (D. Mass. 1975). The motion is therefore denied.

The Clerk of this court is directed to enter judgment reversing the conviction and sentence of Rutherford insofar as based on Count II and directing the district court to enter judgment of acquittal of Count II, and in all other respects affirming the judgments appealed from.

APPENDIX B

Before the United States Grand Jury
For the Eastern District of Illinois

In re:

Matters Under Investigation.

TRANSCRIPT OF TESTIMONY
OF
MARVIN SCHWARTZ

November 25, 1974

Appearance:

Jack Strellis, Esquire
Michael Nester, Esquire
United States Attorneys
Department of Justice
Federal Building
East St. Louis, Illinois

[2] **Marvin Schwartz**
being first duly sworn, testified as follows:

By Mr. Strellis:

Q. Would you state your name, please? A. Marvin Charles Schwartz.

Q. Before we start, do you want to make any statement to the Grand Jury? A. No, sir.

Q. We have presently set up a couple of tapes which depict a conversation had between several persons. Can you state for

the record where this conversation took place? A. In the conference room of Johnston Engineering.

Q. That's in East St. Louis? A. Yes.

Q. Would you be able to recognize the voices of those individuals whose voices have been transcribed on this tape? A. Yes, sir.

Q. Why don't we turn on the tape and as the voice comes on the tape, can you state for the record who that individual is?

A Juror: Would you identify this man for us.

Mr. Strellis: That is Bill Oehler. He is here as technical assistant to assist us in listening to this tape. I would ask Mr. Oehler anything that is done or said in this [3] room, he would not disclose that to anyone without leave of Court or leave of the Grand Jury, without permission to do so.

Mr. Oehler: Fine.

The Witness: I might say that Mr. Oehler was one of the first gentlemen I met with when I met with the FBI and he is the person who helped me set up my tape recorder in the past year.

Q. In the first instance when somebody says something on the tape, describe what he said and the individual stating it. Start at the beginning of the tape, please.

(Whereupon, the tape referred to was started.)

Q. Who stated that, "He's got my damn 38 revolver"? A. That's me.

Q. That's Marvin Schwartz? A. Right.

(Whereupon, the tape continued.)

Q. Who's that, "Good morning, sir"? A. "Good morning, Marvin. Robert, come on in," is Jack Cook.

(Whereupon, tape continued playing.)

The Witness: "You're looking good," is Dave Johnston, and "still talking about the highschool," that's Dave Johnston.

[4] (Whereupon, the tape continued playing.)

The Witness: "62nd and West Main," that's Jack Cook talking.

(Whereupon, the tape continued playing.)

The Witness: That's Dave Johnston leaving the room at this point. He says, "I've got to go downtown," and I don't think he will participate in the conversation anymore.

(Whereupon, the tape continued.)

The Witness: That's Bob Calhoun. I can't distinguish what he said yet.

(Whereupon, the tape continued.)

The Witness: "Coffee urin," the first time is by Bob Calhoun and the second time by Jack Cook.

(Whereupon, the tape continued.)

Q. That last statement was made by—— A. Bob Calhoun, "Are you saying that Fields owes you $9,400?"

(Whereupon, the tape continued.)

The Witness: That's Alvin Fields, Jr., saying, "Ten thousand something."

(Whereupon, the tape continued.)

The Witness: Hennessey is the electrical contractor, owner of A-Age Electrical Contracting. That's who they are referring to.